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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LOWELL D. HEWITT, *et al.*,
Petitioners,

v.

AARON HELMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a civil rights plaintiff is entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 when the litigation for which he seeks fees has resulted in no relief for him.

2. Whether a civil rights plaintiff may base a claim for attorney's fees, or augment an attorney's fee award, on a "catalyst" theory because of the promulgation, during the pendency of the litigation, of a revision of an administrative directive that was neither sought by nor of benefit to the plaintiff.

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INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case requires further definition of the circumstances under which a plaintiff is a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Amici* are concerned that the increasing frequency and amount of attorney's fee awards in civil rights cases threaten the solvency of state and local governments and that the court of appeals' expansive view of the "catalyst" theory as a basis for awarding attorney's fees will inhibit state and local governments in the adoption of needed reforms.

Respondent Helms, a prison inmate, filed suit in 1979 challenging, *inter alia*, his conviction of prison misconduct on the unsupported testimony of an unidentified informant. In the course of several judicial decisions recounted below, the court of appeals ultimately determined that Helms had prevailed in his litigation and thus deserved an award of attorney's fees. The court of appeals held that a mere declaration of Helms' rights, even where no damages were available and no injunctive relief could be awarded, along with the possibility that he served as the catalyst for certain administrative reform, made him a prevailing party.

Under the circumstances of this case, which are elaborated below, an award of attorney's fees to Helms is not justified by Section 1988 and is inimical to the continuing vitality of state and local governments. *Amici* suggest that a plaintiff who has not recovered any substantive relief cannot be said to be a prevailing party in any meaningful sense of the word. *Amici* also suggest that any attorney's fees awarded on a catalyst theory must be justified by a rigorous standard of proof of causation. If an award of attorney's fees is appropriate at all, it must be limited to only that amount fairly allocable to the exceedingly minimal success achieved in the declaration of Helms' rights. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.*

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* Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

On December 3, 1978, Aaron Helms ("Helms") was a prison inmate at the State Correctional Institution at Huntingdon, Pennsylvania, when several guards were injured during a general disturbance. Following the incident, Helms was taken from his cell, escorted to an interview with Pennsylvania State Police, and then placed in restrictive custody. Subsequently, Helms—charged with the assault of corrections officers and the disruption of institutional routine—appeared before a Hearing Committee, an institutional adjudicatory body authorized to resolve misconduct charges. At that time, the Committee did not specifically address the issue of Helms' guilt, but did order that he remain in a restrictive housing unit, in "administrative custody." [1] On January 22, 1979, a second Committee, finding that Helms had assaulted a prison official and had participated in a prison riot, sentenced Helms to six months in "Disciplinary Close Custody." The finding of guilt apparently rested on an uncorroborated report of an unidentified informant.[2]

From this modest beginning has sprung seemingly endless litigation between Helms and officials of the Commonwealth of Pennsylvania. On July 26, 1979, Helms filed a suit pursuant to 42 U.S.C. § 1983 against certain prison officials in which he challenged (1) his detention in administrative custody and (2) his conviction of prison misconduct. In support of his first challenge, Helms claimed that his Fourteenth Amendment due process rights had been infringed by a violation of Pennsylvania's Bureau of Corrections regulations governing administrative segregation because the regulations created a liberty

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[1] The Commonwealth subsequently filed criminal charges against Helms which were dropped on February 6, 1979.

[2] This truncated version of the factual predicate to this litigation may be supplemented by a reading of *Helms v. Hewitt*, 655 F.2d 487, 489-92 (3d Cir. 1981).

interest of which he could be deprived only if he were afforded due process. In support of his second challenge, Helms alleged that his conviction was based on an uncorroborated hearsay account which was constitutionally insufficient. The complaint sought the customary array of remedial options with respect to Helms' restrictive confinement, *i.e.*, declaratory and injunctive relief, damages, costs and attorney's fees, and added the usual prayer for other "necessary and proper" relief.

While the case was pending before the United States District Court for the Middle District of Pennsylvania, and before any decision, Helms was released from prison on parole. His litigation juggernaut, however, which was just gathering steam, rolled on unchecked. When the district court granted summary judgment to the defendants, Helms appealed. The United States Court of Appeals for the Third Circuit ruled that Helms indeed had a liberty interest against his transfer to administrative custody, and that Helms' due process rights had been violated by his conviction of prison misconduct on the uncorroborated hearsay evidence of an unidentified informant. 655 F.2d 487 (1981). The Commonwealth's officials then petitioned this Court for a writ of certiorari. The Court granted the petition, agreed with the court of appeals that Helms had a liberty interest against his transfer to administrative custody, but concluded that Helms had been afforded due process with respect to that liberty interest. The defendants did not seek review in this Court of the court of appeals' holding with respect to the hearsay issue. 459 U.S. 460 (1983).

On remand, the Third Circuit in turn remanded to the district court for further proceedings on the hearsay issue. 712 F.2d 48 (1983). The district court found that the prison officials were entitled to qualified immunity and thus refused any award of damages on this claim. Joint Appendix ("J.A.") 22a-47a (unpublished). While an appeal to the Third Circuit was pending, the Pennsylvania

Department of Corrections issued a comprehensive revision of Administrative Directive 801, which governs prison disciplinary proceedings. The revised Directive included a new section on the use of confidential source materials in hearings on charges of prison misconduct. The Third Circuit later affirmed, without opinion, the district court's judgment against Helms based on defendants' immunity from damages. 745 F.2d 46 (1984).

Thereafter, Helms filed an application for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Fees Act" or "the Act"). The district court denied the application, finding that Helms was not a "prevailing party" within the meaning of the Act because he had lost his claim for damages; his claim for injunctive relief had been mooted by his release from prison; and he had neither sought nor benefitted from the change in administrative procedure. Appendix to the Petition for Certiorari ("Pet. App.") 27a-39a.

The litigation once again proceeded to the Third Circuit, which reversed the district court. Pet. App. 3a-26a, 780 F.2d 367 (1986). According to the court of appeals, Helms was a prevailing party because of its ruling on Helms' first appeal (at which time Helms had already been released from prison on parole) that his due process rights had been violated by the prison officials' unconstitutional reliance on the testimony of an unidentified informant. The court of appeals directed the district court to award attorney's fees "for professional services relating to this issue." Pet. App. 20a, 780 F.2d at 371.

The court of appeals also considered Helms' claim that he was a prevailing party because his suit acted as a catalyst for the promulgation of the revision of Administrative Directive 801.[3] The court stated that it reached

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[3] The court of appeals first referred to the relief allegedly obtained by Helms as the *promulgation* of Administrative Directive 801 (Pet. App. 13a-14a, 780 F.2d at 369), but subsequently cor-

this issue, notwithstanding that it had already found Helms to be a prevailing party, because "one factor in the computation of the amount of the fee award is the extent of relief actually obtained by the prevailing party," *citing Hensley v. Eckerhart*, 461 U.S. 424 (1983). Pet. App. 21a, 780 F.2d at 371. The court of appeals held that if Helms "can establish causation between his suit and 'some of the benefit sought,' he [would be] a prevailing party on this issue." Pet. App. 24a, 780 F.2d at 371. Accordingly, the court of appeals directed the district court to award Helms attorney's fees on the first ground and to hold a hearing on the second ground.

SUMMARY OF ARGUMENT

I. The Civil Rights Attorney's Fees Awards Act of 1976 provides for the award of a reasonable attorney's fee only to a prevailing party. While Congress intended to reward successful litigants who serve as private attorneys general in the civil rights area, it did so within the framework of our adversary system of justice, and legislated that only winners may recover attorney's fees. As the Court has observed, "the most critical factor" in ruling on a fee application "is the degree of success obtained" (*Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

Helms did not prevail in his litigation in any meaningful sense. In several years of litigation, at all three levels of our federal courts, he succeeded only in obtaining a ruling that he should not have been convicted of prison misconduct solely on the uncorroborated hearsay

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rectly noted that what had been issued was a *revision* of the Directive. Pet. App. 21a-25a, 780 F.2d at 371, 372. What the court of appeals did not explain was that Administrative Directive 801 is a comprehensive regulatory statement of prisoners' rights and responsibilities; that it was completely reorganized and revised in 1984 (*compare* J.A. 58a-84a *with* J.A. 85a-116a); and that only one section of the revision (1½ of 31 record pages) pertains to the use of confidential source information (J.A. 101a-102a).

evidence of an unidentified informant. At the time that he obtained this ruling, his earlier request for injunctive relief had been mooted by his release from prison on parole; and, on remand, his claim for damages was defeated by defendants' good faith immunity. The resulting judgment in favor of defendants was affirmed. Thus, Helms achieved no tangible success. Defendants, having achieved a complete victory in terms of the outcome of the lawsuit, should not now be saddled with Helms' attorney's fees.

Even if Helms' litigation was a catalyst for the revision of Administrative Directive 801, that would not make him a prevailing party in his lawsuit, for he obtained none of the individual relief he sought. Helms did not seek any relief for persons other than himself, and received no personal benefit from the revision.

II. A civil rights plaintiff may be a prevailing party eligible for an award of fees even in the absence of a formal judgment in his favor. For example, a fee award may be justified if the litigation serves as a catalyst causing defendants to alter unlawful behavior. However, an award of fees on a catalyst theory requires a showing of causation which is entirely absent from this record.

The bases for the court of appeals' direction to the district court to hold a hearing to determine whether Helms' lawsuit served as a catalyst for the revision of Administrative Directive 801 were (1) an expansive reading of Helms' complaint; and (2) the timing of the the revision. The first ground was contrary to the district court's specific finding that Helms did not "seek relief in the form of corrective procedures." The second ground reflected only the coincidence that Helms' appeal from the final judgment against him was still pending when the revision was issued; the court apparently discounted the fact that the revision was not promulgated until nearly three years after its ruling that Helms' rights had been violated.

These factors, even buttressed by the fact that a part of the revision related to the subject matter of Helms' suit, are insufficient, as a matter of law, to warrant a formal hearing on Helms' claim that his lawsuit served as a catalyst for the revision.

Public policy concerns militate against the facile conclusion that individual litigation—particularly unsuccessful litigation—serves as a catalyst for far-ranging legislative or administrative reforms. The effect of crediting Helms' catalyst theory under the circumstances of this case would be to penalize defendants for action voluntarily taken after they had successfully defended the lawsuit. Moreover, if litigants are not held to a rigid standard of proof in claiming fees on such a theory, the result could be to paralyze reforms that are in any way related to pending or even completed litigation.

Should this Court agree with the court of appeals that there is sufficient basis in this record to require a hearing to determine whether Helms' litigation materially contributed to the revision of Administrative Directive 801, it should make clear that recovery of attorney's fees on a catalyst theory requires proof by clear and convincing evidence (1) that "but for" the litigation, the revision would not have occurred; and (2) that the litigation was the proximate cause of the revision.

III. If the Court concludes that Helms may properly be considered a "prevailing party" within the meaning of the Fees Act, any award of attorney's fees should be restricted to those services that led to the court of appeals' ruling that his conviction of prison misconduct was improperly grounded on the uncorroborated hearsay testimony of an unidentified informant. This declaration was the only "success" that Helms obtained in the lawsuit; and that ruling provides the only foundation for his claim that he caused a revision of Administrative Directive 801.

ARGUMENT

I. HELMS IS NOT A PREVAILING PARTY ENTITLED TO AN AWARD OF FEES

Few statutory provisions have generated as many judicial opinions in the first decade of their existence as has the Civil Rights Attorney's Fees Awards Act of 1976. In the swirling proliferation of litigation, judicial prose, as a basis for interpreting the Act, is seductive; but reliance on it, at least in the first instance, is misplaced. As this Court has consistently observed, " '[t]he starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

The language at issue is deceptively simple. The Act provides, in relevant part, that a district court has discretion, in certain specified federal civil rights actions, to allow the "prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988, set forth in Appendix A-1. The Act's legislative history makes clear that Congress sought to alter the law as announced in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which had repudiated the judicially created "private attorney general" exception to the American Rule that prevailing parties cannot recover their attorney's fees from the losing party absent a statutory authorization or a case falling into preexisting exceptions.[4] As stated in the Senate Report,

> [t]he purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,

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[4] *See* Note, *Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976*, 59 Notre Dame L. Rev. 1293, 1293 n.1 (1984) (describing preexisting exceptions).

> 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909.

Although Congress clearly sought to respond to the holding in *Alyeska*, it is crucial to bear in mind the language that it chose to accomplish the task. Thus, a fee applicant must be a "party" who "prevail[s]," and his fee award must be "reasonable." This language reflects at once an intention to reward private attorneys general in the civil rights area and to observe a measure of fidelity to our adversary system of justice while doing so. By linking the terms "party" and "prevail," Congress acknowledged and acquiesced in an adversary system of justice that declares winners and losers, and legislated that only winners are to be awarded attorney's fees.[5] And, as any novice litigator understands, since wins (and losses) can at times result from fortuity as much as finesse, from apathy as much as advocacy, the award of fees must be "reasonable." Congress sought to reward successful private attorneys general within the context of an adversary system of justice, not to compel state and local governments to subsidize quixotic journeys across the legal landscape.

A. Helms Won Nothing By His Litigation

In light of this understanding of the Act, it is clear that in no meaningful sense did Helms prevail in this litigation. Notwithstanding Helms' continuing legal asasault on the Commonwealth's officials named as defendants in this suit, the court of appeals could point only to its earlier ruling that Helms had been denied due process by the prison officials' unconstitutional reliance on the

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[5] To be sure, the win would not have to be registered in a final judgment, but it nonetheless would have to exist. S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912.

informant's testimony and to the possibility that Helms' litigation may have been the catalyst behind the revision of Administrative Directive 801.

The Third Circuit's narrow focus ignores the fact that this case actually involves several years of litigation and eight decisions at three levels of our federal courts. Helms' entire achievement was a ruling that he had a due process right not to have a finding of guilt grounded exclusively on the testimony of an unidentified informant.[6] And, on the basis of that ruling, the court of appeals directed the district court to enter summary judgment for Helms on that issue *unless* the defendants established their official immunity. 655 F.2d at 502-03. The district court, however, held that the defendants were entitled to qualified immunity and accordingly entered summary judgment for *defendants*. J.A. 48a. Moreover, Helms' resounding "victory"—the ruling that he had been improperly placed in disciplinary custody—was achieved after he had been released from prison on parole.[7] At the risk of oversimplication, and with great respect, *amici* submit that common sense would seem to present a formidable obstacle to the conclusion that Helms "prevailed."[8] Put

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[6] The court of appeals' holding, on Helms' first appeal—"that he had a liberty interest in certain prison regulations"—did not make him a "prevailing party" because this Court held that the requirements of due process had been properly observed with respect to that interest.

[7] In fact, Helms was released on parole before the district court's first decision in favor of the defendants. The complaint had not even been filed until after Helms' release from disciplinary custody. His six-month sentence to disciplinary custody began on December 3, 1978, and thus ended on June 3, 1979. J.A. 16a. The amended complaint in this action was not filed until July 26, 1979. J.A. 1a.

[8] Helms notes that he is once again incarcerated, presumably to show that he may benefit from his litigation. Memorandum in Opposition n.1. It is respectfully submitted that courts must look to adjudicative, *i.e.*, historical, facts in determining the success of civil rights litigation. Congress could not have intended to justify past fees on the basis of future legal infractions by the plaintiff.

another way, "[t]o prevail [under the Act], a plaintiff must obtain 'the primary relief sought.'" *Carbalan v. Vaughn*, 760 F.2d 662, 666 (5th Cir.), *cert. denied*, 106 S.Ct. 529 (1985), *quoting Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981). Helms obtained no such relief.[9]

Congress did not enact the Fees Act to launch academic careers or to reward moral victories. *See, e.g., Dover v. Rose*, 709 F.2d 436, 439 (6th Cir. 1983) ("Thus, while the plaintiff may claim a 'moral victory' in this lawsuit, he has failed to prove that he is entitled to any relief whatsoever" and thus is not a prevailing party under the Act). The legislative history of the Act contains no shred of evidence that Congress intended to divorce the process of vindication of civil rights, insofar as that process leads to awards of fees under the Act, from the adversary system of justice. That system entails winners and losers, and sometimes yields inconclusive results when there are neither winners nor losers. To secure a fee award under the Act, however, one must in some real sense be a winner. As this Court has observed, "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained.*" *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (emphasis added). *Cf. Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (to ground a fee award under § 307 of the Clean Air Act,

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[9] Helms puts much store in his achievement of declaratory relief. *See* Memorandum in Opposition ¶ 4. No declaratory judgment was entered for Helms; he relies on the court of appeals' declaration of his due process rights. Moreover, a claim for declaratory relief is routinely included in many civil complaints; yet, as any litigator understands, such relief is typically meaningless absent a corresponding award of damages or injunctive relief. Thus, the absence of a request for declaratory relief in *Carbalan* in no way distinguishes that case from the present one.

some success on the merits is required; merely contributing to the goals of the Act is insufficient).

In contrast to Congress's focus on successful plaintiffs, Helms achieved no tangible success. Indeed, it is clear upon even the most charitable view that Helms' "success" amounts at best to a moral victory. First, Helms' release from prison mooted his claim to injunctive relief concerning his confinement.[10] Second, Helms lost his claim for damages when the court of appeals affirmed the district court's decision that the prison officials whom he sued were shielded by qualified immunity. Third, Helms never sought and could not benefit from the reform provided by the revision of Administrative Directive 801. Under these circumstances, Helms simply did not prevail in fact.

In a related context, this Court recently reiterated that damages awarded pursuant to 42 U.S.C. § 1983 are not to be based on the abstract value or importance of constitutional rights but rather must be confined to the basic purpose of Section 1983 damages, *i.e.*, to compensate persons for injuries caused by the deprivation of constitutional rights. *Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2543-45 (1986); *see Carey v. Piphus*, 435 U.S. 247, 254 (1978). It would be strikingly anomalous, at the very least, to permit a plaintiff to recover fees for his attorney for abstract "victories" when that plaintiff may recover nothing for himself. Such an extension of the Act is simply not warranted. *Cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (where damages are precluded by official immunity, a fee award was nonetheless possibly appropriate but only because injunctive relief was in fact granted).

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[10] Although Helms also sought injunctive relief requiring that his conviction be expunged from his prison records (J.A. 20a), the district court noted that Helms did not receive any injunctive relief. Pet. App. 30a. Apparently, this claim was abandoned in the district court on the remand for trial on the immunity issue.

The arguments relied on by Helms and accepted by the Third Circuit suffer from a basic confusion concerning the Act and this Court's decisions under the Act. Helms seems to contend (without opposition) that one need not return from court with a judgment in hand in order to be a successful civil rights litigant; other forms of success are also cognizable under the Act. *See* S. Rep. No. 1011, *supra*, at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912. *Amici* do not dispute this proposition. However, this is not a case in which the plaintiff achieved tangible benefit for himself short of judicial decision. *See, e.g., Maher v. Gagne*, 448 U.S. 122 (1980) (consent decree).[11] This litigation is replete with judicial decisions at all three levels of our federal court system. What this litigation lacks is not decisions but any tangible benefit in those decisions for the plaintiff.

Raising a myriad of claims and arguments, Helms achieved from the Third Circuit an abstract declaration of a substantive right that possibly could have grounded a claim for damages if the defendants were legally susceptible to such a claim, which they were not. This is not the stuff of "success." Such a declaration is little more than interlocutory success that may ultimately, and in this case did, evaporate for all practical purposes. *See Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (finding that "it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims"). When evaluating an application for fees in the absence of a formal judicial decision granting tangible relief, courts must focus unwaveringly on the substance and cause of the outcome upon which the litigant rests his claim to have prevailed. *See American Constitutional Party v. Munro*, 650 F.2d 184

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[11] Nor is this a case where plaintiff's counsel sought remedial relief in an administrative forum to vindicate rights gained earlier in a consent decree. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 3094-96 (1986).

(9th Cir. 1981); *cf. Hensley v. Eckerhart*, 461 U.S. 424 (1983). The outcome of Helms' litigation simply does not withstand this scrutiny.

The Fees Act should not be interpreted in such a way as to discourage governmental defendants from interposing meritorious defenses in civil rights suits, even though a defense effort might generate significant legal expenses. Governmental defendants have an obligation to resist litigation claims that would result in inappropriate payments from the public treasury. In this case, the defendants' successful efforts resulted in rejection of all of Helms' monetary claims; his remaining claims were either moot or abandoned. Having achieved a complete victory, in terms of the outcome of the lawsuit, defendants are now faced with an attorney's fee claim in an amount which might exceed any damages that Helms would have recovered had the judgment on the issue of defendants' official immunity been in his favor. *Cf. City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986) ($33,350 damages and more than $245,000 attorney's fees).

If this Court affirms the court of appeals' judgment, governmental defendants will not be able to afford to defend a civil rights suit that presents even a single meritorious abstract legal principle. This result would reverse the usual burden of proof in civil litigation by requiring defendants not only to resist successfully the plaintiff's claims to affirmative relief, but also to demonstrate that none of his arguments has theoretical validity. Defendants would be placed in an impossible position by an interpretation of Section 1988 that would expose them to liability for attorney's fees even if they successfully defend a lawsuit.

B. The Revision of Administrative Directive 801 Did Not Benefit Helms So As to Make Him a Prevailing Party

Helms attempts to claim "success" by relying on a "catalyst" theory and citing the revision of Administra-

tive Directive 801. Even if Helms could establish that he was the catalyst for the revision (which he cannot, as we show in Part II, *infra*), it would not make him a prevailing party because he received no personal benefit from the Directive, and he sought no relief for anyone other than himself.[12] Helms had been released from disciplinary custody even before his complaint was filed, and he was released from prison long before the court of appeals' determination that his rights had been violated through use of the informant's hearsay testimony. Thus, the revision of Administrative Directive 801 could not benefit Helms and could not make him a prevailing party on his claim for individual relief.[13]

The legislative history of the Fees Act and the caselaw make clear that, although Congress intended that the availability of attorney's fees in civil rights cases would enable individual plaintiffs to act as "private attorneys general," it nevertheless imposed the requirement that the plaintiff must be a prevailing party. The only reasonable conclusion is that Congress must have thought the requirement not inconsistent with the goal. Thus, in the absence of success on the plaintiff's individual claim, vindicating the rights of others will make a plaintiff a prevailing party only if he specifically pursues and succeeds in satisfying the claims of others. If the plaintiff does not advance claims on behalf of others, whatever benefit may redound to them is not credited to him and cannot make him a prevailing party.

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[12] The complaint's added prayer for "necessary and proper" further relief cannot reasonably be stretched so far as to encompass claims on behalf of other persons because the facts and allegations of the complaint and the more specific requests for relief relate exclusively to Helms' own situation. *See* J.A. 20a-21a.

[13] Helms did not bring a class action, in which a plaintiff seeking relief for others might claim to be a prevailing party because he had vindicated the rights of others in the class. *See, e.g., Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970).

In legislating the Fees Act, Congress took cognizance of the existing caselaw. In particular, the legislative history cites with approval this Court's interpretation in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), of the term "prevailing" as used in the Civil Rights Act of 1964. *See* S. Rep. No. 1011, *supra*, at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5910. In *Newman*, this Court concluded that fees were appropriate where the party had succeeded "not for himself alone but *also* as a 'private attorney general.'" 390 U.S. at 402 (emphasis added). *See also Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) ("Congress was concerned with enforcement not only of the civil rights of the public at large and of identifiable groups but also with the rights of individual plaintiffs"). Other courts have accordingly held that, in order to support an attorney's fee award, relief obtained for others must be in addition to the plaintiff's personal success or must have been sought by, and therefore creditable to, the plaintiff. *Compare Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910-12 (3d Cir. 1985) (class action), *with Othen v. Ann Arbor School Board*, 699 F.2d 309, 313-14 (6th Cir. 1983) (claim for individual relief); *see also N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (plaintiffs "have prevailed for purposes of Section 1988" if "they can establish causation between their litigation and 'some of the benefits' *they sought*") (emphasis added; citation omitted).

Thus, even if Helms' litigation were the catalyst for the revision of Administrative Directive 801, this would not make him a prevailing party. As we show below, however, Helms cannot successfully claim to be the catalyst.

II. THE *HELMS* LITIGATION WAS NOT THE CATALYST BEHIND THE REVISION OF ADMINISTRATIVE DIRECTIVE 801

As noted earlier, a plaintiff need not obtain formal relief in order to recover fees under the Act. *See, e.g., Maher v. Gagne*, 448 U.S. 122 (1980); S. Rep. No. 1011, *supra*, at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5912. Thus, a party who vindicates his rights through a consent judgment or prevails on an important matter in the course of litigation, even though he does not ultimately prevail on all the issues, may yet remain eligible to be awarded fees. One type of success, short of a formal judicial judgment, for which the plaintiff may be entitled to a fee award, is achieved when litigation acts as a "catalyst" for defendants to alter unlawful conduct.[14] In this case, however, Helms is not entitled to an award of fees because he has not shown, and cannot show, that he was the catalyst behind the revision of Administrative Directive 801.

In determining whether a plaintiff can receive an award of attorney's fees on such a "catalyst" theory, the courts examine the factual and legal environment of the case presented. As the court explained in *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), in reviewing such a fee application the district court must evaluate

> whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff['s] . . . efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

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[14] *See, e.g., Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981); *see also Othen v. Ann Arbor School Bd.*, 699 F.2d 309, 313 (6th Cir. 1983) (dictum); *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981) (dictum); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 439 n.15 (1983).

In this case, as we discuss in Part I, it is clear from the record that the litigation's outcome conferred no benefit on Helms, who had long since been released on parole, and who had sought relief for no one other than himself. Moreover, even if revised Administrative Directive 801 is deemed to "involve an actual conferral of benefit or relief from burden" (*Bonnes, supra*), Helms has fallen woefully short of establishing on the record that his efforts contributed to the revision "in a significant way" (*ibid.*). *See American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981) (plaintiff must show "some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized") (emphasis in original).

In *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980), the plaintiffs filed a class action for injunctive relief in district court, challenging New Jersey's procedure for handling suspected fraud in unemployment benefits. After the suit was filed, New Jersey made changes that cured the alleged faults in its benefit processing system. This administrative action then led to the entry of judgment against the plaintiff. Nevertheless, the court ruled that the plaintiffs might still be entitled to attorney's fees. It added that, in assessing whether the plaintiff is "a prevailing party," a court must look to the substance of the litigation's outcome. If the new procedures, which provided much of the relief that the plaintiffs had initially sought, were implemented *as a result of the lawsuit*, then they were prevailing parties with respect to a portion of their claims (which were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims. *Id.* at 1322.

Cases such as *Ross* underscore the importance of the causal relationship between the lawsuit and the relief claimed as the basis for the fee award. Although the catalyst theory may have a place in the determination

whether a plaintiff is a prevailing party, that plaintiff must do more than identify administrative reform that took place, fortuitously, after his complaint was filed and before the decision on his appeal from an adverse final judgment.[15] The coincidence in time is particularly suspect as evidence of causation in a case like this one that has now been in the courts for more than seven years. Helms would depict a scenario in which he withstood great efforts at dissuasion and finally prevailed in a battle waged over prisoners' civil rights. However, his mere assertion of causation should be insufficient as a matter of law to require a formal hearing of his claim that his lawsuit was the catalyst for revision of the Administrative Directive.

The two factors relied upon by the court of appeals in this case—an imaginative rendering of the complaint, and a telescopic view of the timing of the administrative reform in relation to the litigation—must also be insufficient, as a matter of law, to create an issue regarding causation. First, the court noted (Pet. App. 22a, 780 F.2d at 371) "that the plaintiff specifically requested a change in the defendants' practice so far as it was applied to him." The complaint, however, was not couched in terms of "defendants' practice." Helms did not challenge any existing procedural rules, or even the absence of such rules. He simply sought relief from his own conviction of misconduct and confinement in restricted custody. Not content with the expansion of the plain terms of the complaint, the court then inferred that it "contemplated a modification in the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants." Pet. App. 22a-23a, 780 F.2d at 371. The court of appeals plainly erred in its speculation concerning the relief "contemplated" by

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[15] Helms' petition for attorney's fees contains three paragraphs that simply announce that he is a prevailing party without even alluding to the catalyst theory or the administrative reform that Helms claims to have caused. J.A. 49a-50a.

Helms.[16] His complaint was clearly, specifically, and exclusively concerned with his own situation; and the record of the case does not contain a single factual allegation tending to demonstrate a nexus between this lawsuit and the revision of Administrative Directive 801.

The touchstone in determining whether a fee award is appropriate, as this Court has made clear, is the relationship between the relief that the plaintiff has sought and the relief obtained. *See Hensley v. Eckerhart*, 461 U.S. at 434, 440. This Court has never suggested an inquiry into what relief the plaintiff may have "contemplated."

Second, the court of appeals found that the "timing of the promulgation of the revised regulations in relation to the course of this suit is sufficient to suggest that the district court should review carefully the causation issue." Pet. App. 24a-25a, 780 F.2d at 371. The suit, however, remained pending only in a technical sense at the time of the administrative revision. Helms had lost his case. The only remaining trace of his litigation was the pendency of his appeal on the issue of defendants' immunity from damages—an appeal that resulted in affirmance of the summary judgment that had been entered against him. The timing of the revision in relation to the single favorable ruling that Helms received undercuts any reliance on a catalyst theory. The court of appeals had ruled on June 30, 1981, that Helms' rights had been violated. Revised Administrative Directive 801 was not promulgated until May 1, 1984. The wheels of government may turn slowly, but the delay of nearly three years appears conclusive that Helms' lawsuit was not the motivating factor of the revision.

Under these circumstances, *amici* submit that the court of appeals erred when it directed a hearing on Helms'

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[16] Indeed, the court's speculation is directly contrary to the specific finding of the district court, that Helms did not "seek relief in the form of corrective procedures . . . in the use of undisclosed informants." Pet. App. 38a.

contention that he served as a catalyst for the revision of Administrative Directive 801.[17]

Compelling public policy reasons also militate against permitting Helms to seek attorney's fees on a catalyst theory on this record. State and local governments are often the targets of suits like Helms'. Such entities constantly have procedures and substantive rules under review, and frequently make changes in the rules to benefit their citizens. Such changes typically occur as one might expect in a democracy: as a result of the interplay of such numerous and complex variables that one cannot, except at the most superficial level, attribute the result to any single event. This truism is common knowledge to public policy analysts. Yet the court of appeals, on a record devoid of any evidence of a connection, would require a hearing to determine whether Helms' lawsuit was a material cause of the revision of Administrative Directive 801. Among other vices, it defies common sense to posit a catalyst theory on no more than general similarity of subject matter and a coincidence of timing.[18]

The Administrative Directive in effect at the time of Helms' confinement in disciplinary custody was completely revised. The revisions, extending throughout the comprehensive regulation, included three new paragraphs relating to the use of confidential source information (J.A. 101a-102a).[19] Simple logic compels the conclusion

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[17] This Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[18] Compare the finding of the district court in this case, that Helms did not "seek relief in the form of corrective procedures" with the recognition by the district court in *Ross v. Horn*, "that this litigation was 'at least . . . a contributing factor' in the bringing about of these procedural changes" (quoted in 598 F.2d at 1322).

[19] Helms' current assertion of his catalyst theory is stated so broadly that he appears to claim credit for the entire revision; obviously, his lawsuit, which led to the court of appeals' ruling that Helms' due process rights had been violated by his conviction on

that these paragraphs were added as a part of the comprehensive revision process, for reasons having little or nothing to do with Helms.

Crediting Helms' "catalyst" theory would penalize defendants for an action that was taken after they had successfully defended his lawsuit. This fact plainly serves to distinguish those cases which allowed an attorney's fee on the basis of governmental action for the benefit of a plaintiff (or a plaintiff class) that was undertaken before judgment, or after a preliminary decision favorable to the plaintiff. The revision of the Administrative Directive, even as it related to confidential sources, was not required by any court order, nor taken in order to forestall a court order.[20]

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uncorroborated hearsay evidence, could not possibly have precipitated revision of the entire Directive, of which only three paragraphs were remotely relevant to that ruling.

[20] In *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), the court held that if the "defendants' conduct . . . is not required by law, then [they] must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau* involved administrative reform agreed to in a consent decree without any adjudication that the prior practice was unconstitutional. The case aptly discloses the difficulty in identifying a catalyst of actions which, as in this case, are not taken in response to and are not compelled by any pending litigation. Although the Third Circuit ruled that Helms' due process rights had been violated, the section in the revised Directive relating to confidential sources not only went beyond any relief requested by Helms (who was concerned exclusively with his own conviction), but also beyond anything required by the Third Circuit's decision. That decision did not prescribe conditions for the admissibility of confidential hearsay testimony, as the revised Directive does, but ruled only that prison officials could not base a conviction on such testimony in the absence of corroboration or some evidence permitting an evaluation of the informant's credibility. Because the revision of Administrative Directive 801 was neither responsive to nor compelled by the court of appeals' opinion, this Court could hold, as a matter of law, that Helms' litigation was not the cause of the revision. *Cf. Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 915, 920 (3d Cir. 1985) ("gratuitous judicial endorsement" does not make plaintiff a prevailing party).

Moreover, if Helms is permitted to seek an attorney's fee merely by claiming credit for the revision, the result could be to paralyze legislative or administrative reforms that are in any way related to pending or completed litigation. The revision of Administrative Directive 801 can undoubtedly be manipulated in such a fashion as to give rise to attorney's fee claims by other prison inmates who have obtained a judicial declaration of their rights concerning the conditions of their confinement.[21] Plainly, legislators and administrators cannot be presumed, by their good faith attempts to institute reforms, to be responding to every minimally meritorious prison complaint litigated within their State; a reform measure should not be regarded as such a response in the absence of specific evidence identified by the plaintiff seeking an attorney's fee, linking the reform, in a clear and significant way, to a particular lawsuit.

At most, the section on "Confidential Source of Information" may have been suggested by the court of appeals ruling on Helms' first appeal. Correction officials, as a part of the process of revising the Administrative Directive, would undoubtedly have sought to achieve the greatest currency and constitutional consistency possible. Therefore, the identification by the Third Circuit in Helms' suit of a constitutional flaw in the disciplinary hearing process may have led them to seek to correct that flaw.[22] But Helms' litigation was, in this respect, no more

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[21] The affidavit submitted in support of Helms' fee application advises that, as of September 1980, the legal services organization that represented him had three attorneys working full time on prison matters. J.A. 57a.

[22] We note that in suits based on actions taken after the Third Circuit's opinion, prison officials might have been unable to sustain a good faith immunity defense to a damages action. That kind of a "catalyst" derives from compulsion of a different sort, and serves far different interests. For one thing, such actions are taken to protect defendants and not plaintiffs. There is no reason to credit a plaintiff with causing reforms which benefit defendants.

a catalyst than a lawsuit brought in another jurisdiction would have been.

Should this Court nevertheless conclude that the tenuous connection between this lawsuit and the revision of Administrative Directive 801 suffices to warrant a hearing on Helms' contention that he played a causative role justifying an award of attorney's fees, we urge the Court to set specific guidelines for resolving such claims. Those guidelines, we submit, should acknowledge the weighty public policy reasons for the close scrutiny of any catalyst claim. The burden should be placed on Helms to show by clear and convincing evidence, that *but for his litigation* the Directive would not have been adopted and that his litigation was the proximate cause of the Directive.

The use of "but for" or *sine qua non* analysis is appropriate where, as here, the delineation of causal relationships is difficult, the interest against compelled subsidization of unproductive litigation is substantial, and the lower courts and litigants need to be guided by a legal standard that benefits from the evolutionary influences of the common law. State and local governments must feel free to adopt beneficial changes to their substantive and procedural rules as a matter of sound governmental policy and without concern that, by so doing, they will be required to pay large legal fees generated in litigation that, although contemporaneous with a policy change, bears little or no relationship to its causal origins.[23] "It is probably safe to say that whenever this ['but for'] test is met, the cause in fact relation does

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[23] It is instructive to note, by way of analogy to the law of torts, that the common law has long tended to exclude from evidence the adoption of post-accident precautions because "to admit the evidence would be a great deterrent against taking the precaution, and the law chooses to encourage the precaution." F. Harper, F. James & O. Gray, 3 *The Law of Torts*, § 17.3, at 589 (2d ed. 1986). Similarly, sound public policy reasons suggest that adoption of legislative and regulatory reforms not be discouraged by any concomitant obligation to pay legal fees unless the litigation for which fees are sought actually *caused* the reform.

exist." F. Harper, F. James & O. Gray, 4 *The Law of Torts*, § 20.2, at 91 (2d ed. 1986).

In addition, the Court should require that the cause-in-fact be the proximate (or legal) cause, so that there will be no question that the factual event is "causally relevant." *Id.* at 92 n.3. For example, litigation may in fact cause an administrative body to convene a meeting, and therefore satisfy the "but for" test; but if the administrative body then adopts a new rule that is not directly related to the litigation, the requirement of proximate (or legal) cause is not met.

Finally, the Court should require the plaintiff to satisfy his burden by "clear and convincing" evidence. "The function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*Addington v. Texas*, 441 U.S. 418, 423 (1979), *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). As this Court has repeatedly observed, "we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 441 U.S. at 425; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In this area of crucial importance both to civil rights plaintiffs and to state and local governments, adoption of the "but for" rule, the proximate cause requirement, and the "clear and convincing" evidence standard will help ensure that only those litigants who are truly catalysts are compensated under the Act.

III. IF HELMS IS DETERMINED TO BE A PREVAILING PARTY, HIS ATTORNEY'S FEE AWARD MUST BE NARROWLY LIMITED TO THE MINIMAL SUCCESS THAT HE ACHIEVED

If Helms may properly be considered a "prevailing party" within the meaning of the Fees Act, this Court should make it clear that any award of attorney's fees

must be restricted to those services that contributed directly to his minimal success. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

This is not a case in which "the plaintiff's claims for relief . . . involve a common core of facts or [are] based on related legal theories" (*Hensley*, 461 U.S. at 435). As detailed in the Statement of the Case (pp. 3-5, *supra*), Helms pursued two distinct claims, factually related only in that they both arose from defendants' actions taken in response to the prison riot on December 3, 1978. Two distinct actions were challenged, however, and they were challenged on distinct legal theories. It is thus not difficult to separate Helms' claims one from the other. This Court has made clear that when the plaintiff presents "distinctly different claims for relief that are based on different facts and legal theories," even if those claims are raised in a single lawsuit against the same defendants, "counsel's work on one claim will be unrelated to his work on another claim." *Hensley*, 461 U.S. at 434-35. The Court concluded that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 435 (footnote omitted).

Helms' first claim, in which he contended that his detention in administrative custody violated his due process rights, was ultimately rejected by this Court. 459 U.S. 460 (1983). Helms thus achieved no success on this claim, and is not entitled to any fee for counsel's efforts pertaining to it.

If Helms succeeded at all, it could only have been on his second claim, which related to his conviction of prison misconduct and his sentence to disciplinary custody. This second claim led to the court of appeals' ruling that Helms' constitutional rights had been violated by defend-

ants' reliance on the uncorroborated hearsay testimony of an unidentified informant. That ruling came after the end of Helms' imprisonment, so that injunctive relief was no longer available.[24] After remand, Helms' claim for damages was defeated by reason of defendants' qualified immunity.

Thus, the only "success" achieved by Helms on his second claim was the declaration of his rights on his first appeal to the Third Circuit, and, possibly, being the catalyst for the inclusion in revised Administrative Directive 801 of the provisions relating to the use of confidential sources. Under *Hensley*, only the time reasonably spent on successful claims is compensable. We consider both aspects of Helms' "success" below.

If the Court finds that Helms is a prevailing party because of the court of appeals' declaration of his rights, the award of attorney's fees must be restricted to the time actually spent in obtaining that ruling. Any time spent on his first claim or after the court of appeals' first decision is not compensable. *See Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 920 (3d Cir. 1985) (district court directed to "disallow entirely all hours spent litigating [the] case after the date on which plaintiffs received their last benefit from defendants").

We note that if the Court accepts Helms' view that he is a prevailing party because he achieved this declaration of his rights, the Court need not address his contention that, in addition, he caused a revision of the Administrative Directive. Assuming, *arguendo*, that Helms could establish that he had some effect on the process of revising the Directive, that effect would be limited to its inclusion of provisions relating to the use of confidential sources. Because he did not seek any administrative re-

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[24] Helms' claim was mooted by the passage of time alone, not, as in *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), because of action taken by defendants in response to his lawsuit.

form, he can claim causative effect on the Directive only because of the court of appeals' declaration that his due process rights were violated by the use of the hearsay evidence against him. Thus, the time spent with the alleged result of triggering the administrative reform corresponds exactly with the time reasonably spent to convince the court of appeals that Helms' conviction violated his procedural rights.[25]

If the Court finds that the mere declaration of Helms' rights is not sufficient to make him a prevailing party, but does not reject, as a matter of law, his contention that he was a catalyst for administrative reform, then *amici* submit that the instructions on remand to the district court should make clear that causation can be derived solely from the court of appeals' declaration of a due process violation. Thus, even if the district court ultimately finds that Helms was a catalyst, the most that he could obtain as attorney's fees would be compensation for the time reasonably spent in obtaining that court of appeals ruling.

It should be noted that *amici* do not attempt to resurrect a wooden rule of proportionality between fees and damages. In *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986), the Court rejected the view that fees and damages must bear an ideal mathematical relationship to one another. *Riverside* involved plaintiffs who had unquestionably succeeded on the merits and had received substantial damages. This Court upheld an award of attorney's fees, many times larger than the damages, on the basis that the district court's findings in favor of the plaintiffs were not clearly erroneous. *Riverside* does not affect *Hensley*'s holding that an attorney's fee may be awarded only to compensate work reasonably performed to achieve success. In holding that the hours reasonably

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[25] *Cf. Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984) (" 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee") (citation omitted).

expended in obtaining substantial success should be fully compensated, even if the resulting fee appears disproportionate to the damages, *Riverside* does not retreat from *Hensley*'s teaching that the Act affords no compensation for services performed in pursuit of severable unsuccessful claims.

In the present case, the district court ruled that no fee award was appropriate because Helms was not a prevailing party, only to be reversed on legal grounds by the court of appeals. *Amici* contend that the district court properly denied any fee award, as Helms simply did not prevail in fact. Should this Court disagree, and conclude that Helms should be rewarded for achieving a modicum of success, the fee award should be restricted, in accordance with *Hensley*, to the effort required to obtain that hollow victory.

Should the case be remanded to the district court, we urge this Court to emphasize clearly the continued vitality of *Hensley*—results matter.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.